Filed 4/14/03 In re Matthew E. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re MATTHEW E., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. MATTHEW E., Defendant and Appellant.	C040651 (Super. Ct. No. JV106552)

Minor Matthew E. admitted that he was within the provisions of Welfare and Institutions Code section 602 in that he committed a lewd act on a child under age 14.[1] (Pen. Code, § 288, subd. (a).) He was adjudged a ward of the juvenile court and committed to the probation officer for suitable placement.

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[1] Further undesignated statutory references are to the Welfare and Institutions Code.

Between January and September 2001 he was placed at, and removed from, four different group homes and then returned to one of those homes. In October 2001, a petition was filed alleging he violated probation by twice failing to keep the probation officer informed of his whereabouts and twice remaining away from his placement without permission. Following a contested disposition hearing, the failure-to-inform allegations were found true. The 13-year-old minor was continued as a ward, committed to the California Youth Authority (CYA) for eight years or until age 21, and awarded 350 days of credit for time served.

On appeal, the minor contends (1) the true findings on the failure-to-inform allegations are not supported by sufficient evidence; (2) his commitment to CYA rather than a less restrictive alternative was an abuse of discretion; (3) a section 241.1 report should have been obtained before a disposition was chosen; and (4) an additional five days of predisposition credit should have been awarded; the People concede this point. We shall modify the judgment and affirm as modified.

FACTS[2]

The Original Petition

On July 31, 2000, the minor went into a bathroom with four-year-old A., the daughter of his babysitter. A.'s sister tried to get into the bathroom, but the minor blocked her view. A. told police that the minor had removed her clothes and had placed his penis near her vagina between her legs. A physical examination revealed redness near the vagina area but no penetration.

The Petition for Violation of Probation

In September 2001, the minor was placed at the Paradise Oaks Group Home. On October 23, 2001, the minor left the group home during a physical education class without permission and returned to his parents' residence. The group home filed a missing persons report. The minor's father brought him back to the group home the next day, October 24.

Later on October 24, 2001, the minor again left the group home without permission and went to his parents' residence. His parents brought him back to the home on October 25, and his probation officer arrested him.

The minor never notified the probation officer that he was going to leave the group home and return to his parents' residence.

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[2] Because the minor admitted the allegation of the section 602 petition, our statement of facts is taken from the probation report.

DISCUSSION

I

The minor contends the juvenile court's finding that he violated the terms of his probation is not supported by substantial evidence. The point has no merit.

Where a trial court resolves conflicting evidence to determine whether a probationer has willfully violated probation, the appellate court reviews the determination for substantial evidence. We consider whether, upon review of the entire record, there is substantial evidence of solid value, contradicted or uncontradicted, which will support the trial court's decision. We give great deference to the trial court and resolve all inferences and intendments in favor of the judgment. Similarly, all conflicting evidence is resolved in favor of the decision. (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848-849; see *In re Robert H.* (2002) 96 Cal.App.4th 1317, 1330.)

Condition 14b of the minor's probation required him to "[k]eep the Probation Officer informed at all times of your living and mailing address and telephone number."

The petition for violation of probation alleged that on October 23 and 24, 2001, the minor "violated probation condition number 14b in that he failed to keep his Probation Officer informed of his whereabouts."

The trial court sustained the allegations, explaining, "I guess by walking away and not telling the probation officer

where your whereabouts are, it pretty much takes in when you go home or anywhere else. Probation doesn't know where you are unless you notify them or tell them."

The minor claims condition 14b "is clearly aimed at a probationer who *permanently* changes his residence or mailing address, not merely someone who takes a 'trip' from his placement for less than 24 hours." However, assuming for the sake of argument that this interpretation is correct, the juvenile court could infer that neither absence was intended to be a mere "trip," and that the minor would have stayed permanently at his parents' home had they not intervened by returning him to the group home. He had previously absconded from several group homes, and the inference that he did not intend to live at any group home is compelling. Although no evidence showed that the minor "[took] away his clothes or other possessions from the group home," the court could deduce that he intended to abandon them in exchange for his freedom.

The evidence showed that, on two occasions, the minor reached his parents' home where he inferentially intended to remain permanently. On each occasion, the minor acquired a new address and his probation required him to notify the probation officer, but he did not do so.[3] The findings of violation of

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[3] The minor theorizes that his address "stayed the same until he was permanently moved out" of the group home, necessarily by the probation placement officer. We think the condition requires something more than the idle act of notifying the probation officer of address changes *implemented by the probation officer*.

probation are supported by substantial evidence. (*People v. Kurey, supra,* 88 Cal.App.4th 840, 848-849.)

Moreover, we may reverse the judgment only if we find a miscarriage of justice on the whole record. (Cal. Const. art VI, § 13.) Another of the minor's conditions of probation stated that the minor was to "Obey all laws and reasonable directives of parents/legal guardians or group home staff, school officials, and the Probation Officer." The minor's conduct clearly violated this condition. It would be a miscarriage of justice to absolve the minor from any responsibility for his conduct in twice leaving the group home. Conversely, there is no miscarriage of justice in holding him responsible for his conduct.

II

The minor contends the juvenile court abused its discretion by committing him to CYA instead of a "Level 14 Facility" or "high level group home." We are not persuaded.

"We review a commitment decision only for abuse of discretion, and indulge all reasonable inferences to support the decision of the juvenile court. [Citations.] Furthermore, it is clear that a commitment to the Youth Authority may be made in the first instance, without previous resort to less restrictive placements. [Citations.] Finally, the 1984 amendments to the juvenile court law reflected an increased emphasis on punishment

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(Civ. Code, § 3532; *People v. Mendoza* (2000) 23 Cal.4th 896, 911.)

as a tool of rehabilitation, and a concern for the safety of the public. [Citation.]" (*In re Asean D.* (1993) 14 Cal.App.4th 467, 473; see *In re Tyrone O.* (1989) 209 Cal.App.3d 145, 151.)

Because commitment to CYA cannot be based solely on retribution, there must be evidence demonstrating probable benefit to the minor and the ineffectiveness or inappropriateness of less restrictive alternatives. (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576.)

There was substantial evidence that less restrictive alternative placements had been unsuccessful. The probation officer testified at the contested disposition hearing that the minor had absconded from group home placements several times. He left the Trinity Interim Home three times before being terminated as a placement failure. He then left the Paradise Oaks group home six times during February 2001. During one unexcused absence, he admitted to smoking marijuana. The minor was then referred back to court as a placement failure.

The probation officer explained to the minor how important it was for him to remain in the group home and work on his issues. He was returned to Paradise Oaks, but he left without permission and was again referred to court as a placement failure. The probation officer then recommended placement in an out-of-area group home, the Trinity Group Home in Ukiah. The minor did poorly in this home, failing two "behavior contracts." After being arrested in Mendocino County for receiving stolen

property, the minor was brought back to Sacramento for further placement.

The probation officer contacted five sex offender programs, but all rejected the minor based on his history of absconding and his aggressive behavior. The officer then re-contacted Paradise Oaks, which agreed to readmit the minor provided that he remain there and work with its program. However, the minor left Paradise Oaks without permission on three separate occasions during his first month there. As a result, the probation officer filed a section 777 petition and recommended a CYA commitment.

Placement at a level 14 group home was considered but rejected because level 14 facilities focus on mental health issues and do not deal with sex offenders. Moreover, because level 14 facilities are not locked, they would be equally powerless to prevent the minor from leaving.

Although level 14 facilities are not locked, the minor contends they are an appropriate placement for him because he would not engage in impulsive behavior such as leaving his placement if he were properly medicated. We disagree.

The minor relies on a psychological evaluation by Jeffrey E. Miller, Ph.D., which found it "highly likely that [the minor] has been misdiagnosed" as having Attention-deficit/Hyperactivity Disorder (ADHD), whereas he actually

suffers from Bipolar Disorder.[4] Dr. Miller explained, "[c]hildren and adolescents with a Bipolar Disorder often have behavioral symptoms similar to children and adolescents who have ADHD; but children and adolescents with a Bipolar Disorder have more intense angry outbursts. They are often impulsive, and engage in promiscuous and inappropriate sexual behavior if they are not on appropriate mood-stabilizing medication. When they are on appropriate medication (such as lithium), they are more calm, less impulsive, less emotionally volatile, and less likely to engage in inappropriate sexual behaviors." If the minor were treated for Bipolar Disorder, it is "much less likely that he would impulsively run away . . . ."

Dr. Miller admitted at the hearing that Bipolar Disorder is "one of the most difficult diagnoses to make because many of these adolescents often exhibit other symptoms such as attention deficit disorder, which is a diagnosis that [the minor] had before." Dr. Miller was certain of his diagnosis, "as much as anyone can be certain, given the uncertainty of making psychiatric diagnoses."

The uncertainty of the diagnosis, and thus of the minor's response to the proposed treatment, evidently was too much for the juvenile court, which stated it did not "feel comfortable taking the risk that [the minor] is going to behave himself now,

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[4] On September 4, 2002, we granted the minor's motion to augment the appellate record to include Dr. Miller's report.

that he is going to come around, when they have tried so many different group homes over and over." While not referring explicitly to Dr. Miller's report or his testimony, the court expressly rejected alternatives that posed excessive risk and impliedly rejected the uncertainty that would be inherent in committing the minor to a level 14 facility for treatment with psychotropic medication.[5] The court's ruling was not arbitrary or capricious, nor an abuse of discretion. (*In re Asean D., supra,* 14 Cal.App.4th at p. 473; *In re Tyrone O., supra,* 209 Cal.App.3d at p. 151.)

III

The minor contends the juvenile court erred by making a disposition without obtaining a section 241.1 report.[6] Alternatively, if he waived his entitlement to the report by

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[5] The People's briefing does not discuss Dr. Miller's report or his testimony. This was unhelpful.

[6] Section 241.1 states in relevant part: "(a) Whenever a minor appears to come within the description of both Section 300 and Section 601 or 602, the county probation department and the child protective services department shall, pursuant to a jointly developed written protocol described in subdivision (b), initially determine which status will serve the best interests of the minor and the protection of society. The recommendations of both departments shall be presented to the juvenile court with the petition that is filed on behalf of the minor, and the court shall determine which status is appropriate for the minor. Any other juvenile court having jurisdiction over the minor shall receive notice from the court, within five calendar days, of the presentation of the recommendations of the departments. The notice shall include the name of the judge to whom, or the courtroom to which, the recommendations were presented."

failing to request it, then his trial counsel rendered ineffective assistance. We disagree.

Sentencing waiver principles are fully applicable to disposition hearings at which the conditions of juvenile probation are imposed. (*In re Josue S.* (1999) 72 Cal.App.4th 168, 172-173; *In re Khonsavanh S.* (1998) 67 Cal.App.4th 532, 536-537.) The waiver rule applies where there is a failure to object to the adequacy of, or lack of, various assessment reports in juvenile proceedings. (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 501-502 [failure to obtain § 366.26, subd. (b) assessment report]; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338-1339 [failure to request bonding study]; *In re Crystal J.* (1993) 12 Cal.App.4th 407, 411-412 [failure to object to adequacy of assessment].) We conclude the minor waived entitlement to a section 241.1 report by failing to request it.

To demonstrate ineffectiveness of counsel, the minor "must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms [citation], and that a reasonable probability exists that, but for counsel's unprofessional errors, the result would have been different. [Citations.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 148; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.)

"'"[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one,

or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding. [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

The minor claims "[t]here can be no tactical reason for not requesting the 241.1 report." We disagree. The minor's trial counsel may have realized that little, if anything, could be gained by requesting the report. This possibility is confirmed by the minor's appellate argument, which speculates that a report would have contained unspecified "additional information" that would have led to "possibly other" unidentified "choices than CYA to which to send" him. Under these circumstances, the minor's contention is most appropriately brought in habeas corpus proceedings. (*People v. Mendoza Tello, supra,* 15 Cal.4th at pp. 266-267.)

IV

The minor contends, and the People concede, the juvenile court erred by awarding him 350 days of custody credit instead of 355 days. We accept the People's concession.

The "Juvenile Custody Time Credits" worksheet stated that the minor was confined in Sacramento Juvenile Hall from January 23, 2001, until February 1, 2001. However, the probation department's placement report shows that the minor was moved from Juvenile Hall to Paradise Oaks on February 5, not

February 1. The minor is entitled to an additional four days of custody credit for this period.

The worksheet also notes that the minor was taken into custody and placed in Juvenile Hall on October 25, 2001. He remained there until his disposition hearing on March 8, 2002, when he was committed to CYA. The minor is entitled to 135 days of credit for this period but was awarded only 134 days. We shall modify the judgment to award the minor an additional five days of custody credit.

DISPOSITION

The judgment (disposition order) is modified to award the minor 355 days of credit for time served. As so modified, the judgment is affirmed. The juvenile court is directed to prepare an amended dispositional order and to forward a certified copy to the California Youth Authority.

SIMS, Acting P.J.

We concur:

RAYE, J.

KOLKEY, J.